No Adverse Impact: Working Together to Prevent Harm

The primary focus of the "no adverse impact" concept is its call for collaboration amongst all of those involved in complicated land use decisions. As this article demonstrates, floodplain and wetland managers using this approach should fare well, both in the eyes of the community and in the courts.

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The appropriateness and propriety of our government's regulation of land use is increasingly subject to serious question, and even assault, by individuals and groups who are dedicated to protecting the private property rights established by the U.S. Constitution and our American system of laws. These concerns are understandable, particularly when an individual property owner is forced to bear a significant, possibly crushing, burden of regulation and diminished property value for the betterment of his or her community. On the other hand, our system of laws, property rights, and duties—the principles of which date back to the Roman times—tremendously supports the concept of governmental regulation to prevent harm to the public. While prevention of harm to the public is important to the National Wetland Policy Forum's goal of "No Net Loss of Wetlands" and the National Flood Insurance Program, it represents the fundamental philosophy of the Association of State Floodplain Manager's concept of No Adverse Impact (NAI).

The September-October 2006 issue of the *National Wetlands Newsletter* focused on the U.S. Supreme Court's decision in *Rapanos v. United States*.[1] That issue included an article calling for collaboration between all of our nation's water resource planners: wetland managers; water quality specialists; floodplain managers; and stormwater managers.[2] This Article discusses more specifically the concept of NAI as a means toward collaborative land use decisionmaking.

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The Principles of NAI

Government's ability and fundamental core duty to protect the property rights and safety of all in a community have deep legal roots, and if properly applied, they should resist legal challenge as much as anything can in this uncertain world. The "Do No Harm" or NAI approach to floodplain, stormwater, and wetland management is no exception. Premised on the maxim of ancient Roman Law "*Sic utere tuo ut alienum non laedas*" ("Use your own property so that you do not injure another's property"),[3] NAI ensures the action of any property owner, public or private, does not adversely impact the property rights of others. This principle requires a community to look at the processes needed to prevent damage to people, property, and the environment. It requires looking beyond business as usual, including rote reliance on local, federal, and state minimum standards. Most importantly, NAI is legally acceptable, non-adversarial (neither pro- nor anti-development), understandable, and palatable to the community as a whole. Because an individual has never possessed the "right" to use their property to harm others under our system of property rights and duties, preventing an individual from harming others is not and cannot result in a diminution of their property value. The NAI approach thus alleviates the real and understandable concern individuals, organizations, and groups might have about any actions seemingly intruding on their property rights.

The Association of State Floodplain Managers first recommended the NAI approach in 2000 as a way for communities, governments, and floodplain managers to control the spiraling impacts that flooding and new development have on one another. Under the NAI approach, the developer and regulator work together to:

- identify the impacts of a proposed development;
- determine the properties that will be impacted;
- notify impacted persons of the impact of any proposed development;
- design or re-design the project to avoid adverse impacts; and
- offer appropriate mitigation measures acceptable to affected members of the community as well as the community as a whole.

The NAI approach also requires that the public—potential victims of poor floodplain management—are informed during the development process so that they can voice their concerns to community officials. NAI is consistent with no net loss of ecological functions, dovetails beautifully with the concept of "No Net Loss of Wetlands," and complements good wetland and stormwater regulation. It also provides a pragmatic standard for regulation and makes sense on a local and regional basis. In fact, the Federal Emergency Management Agency's Community Rating System gives credits for most NAI floodplain management activities, which may lead to lower flood insurance premiums in eligible communities.

The NAI approach also has broad conceptual support. For example, the Cato Institute, a conservative think tank closely associated with the strong protection of private property rights, has stated that "when regulation prohibits wrongful uses, no compensation is required."[4] The NAI approach, therefore, alleviates the threat that regulation will be deemed a "taking" requiring "just compensation." Notably, the NAI approach is accorded an enormous amount of deference by the courts.

NAI and Regulatory Takings

The NAI approach is consistent with ancient common law as well as with modern U.S. law. The Fifth Amendment to the U.S. Constitution says: "nor shall private property be taken for public use without just compensation." There have been some famous court cases that clarified this, notably *Pennsylvania Coal Co. v. Mahon,* in which the U.S. Supreme Court held that a government regulation can restrict an owner's freedom to use his property to such an extent that it can constitute a "taking" of that property without compensation.[5]

Yet many state and local governments report that they are very concerned that they will be sued for a taking and for that reason are reluctant to regulate development. Over the last few decades, there has been an increase in takings cases and related controversies involving land development. However, based on a review of those cases concerning the protection of people and property from a hazard, a common thread emerges: *the courts have gradually required an increased standard of care as the state of the art of hazard management has improved.*

State and local governments are more likely to be successfully sued for permitting development that causes problems—such as roads, stormwater systems, and bridges—than they are for prohibiting such development. There have been almost no hazard-based regulations held to be a taking. On the other hand, there have been many, many cases where communities and landowners were held liable for harming others. In sum, had the developers and government used the NAI approach, harm could have been mitigated and litigation could have been avoided. Simultaneously, courts are more likely to uphold regulated development where the NAI approach is taken.

Of course, there are cases where the courts have found that regulation constitutes an unconstitutional taking of property. Understanding the parameters of takings law is therefore paramount for anyone involved in land use regulation.

Lingle v. Chevron

The U.S. Supreme Court recently examined regulatory takings in *Lingle v. Chevron*,[6] which involved a Hawaiian statute that limits the rent oil companies may charge dealers leasing company-owned service stations. The lower courts relied on *Agins v. City of Tiburon*[7] and held that a taking occurred because the statute did not substantially advance a legitimate state interest. But the Court reversed and remanded, holding that the "substantially advances a legitimate state interest" formula is not a valid test for determining whether a regulation effects a Fifth Amendment taking. This is a huge help to floodplain managers, to the concept of NAI, and to planning in general. In essence, the question of whether an action by a legislative body "substantially advances a legitimate state interest" allowed for judicial second-guessing of the relative merits of legislative action. In *Lingle*, the Supreme Court is indicating that courts should defer to legislative decisions unless there is no real relationship between what the legislative body desires and the action taken or there is some other due process or equal protection issue.

The Court went on to articulate four situations under which governmental regulation may be deemed an uncompensated taking of private property:

1. Any regulation that amounts to a permanent, physical occupation of another's property is a taking, as was the case in *Loretto v. Teleprompter Manhattan CATV Corp.*[8] In *Loretto,* the state of New York required landowners to allow a cable company to install cables and a cable box the size of a cigarette pack on all residential buildings.

2. The denial of all economically productive use of private property, as exemplified by *Lucas v. South Carolina Coastal Council,*[9] where plaintiff was prohibited from building a home on the only vacant lots left on an otherwise fully developed barrier beach just outside Charleston, South Carolina. The regulation would not be deemed a taking only if common law principles of nuisance and property forbade the intended use of the land.[10]

3. A regulation that frustrates investment-backed expectations of the landowner, as was the case in *Penn Central Transportation Co. v. City of New York.*[11] In that case, the Penn Central Company was not permitted to build above Grand Central Station in New York City to the full height permitted by the overlay zoning in the area for historic preservation reasons.

4. Land use exactions that are not really related to the articulated government interest, as in *Nollan v. California Coastal Commission*,[12] where the California Coastal Commission conditioned a permit to expand an existing beachfront home on the owner granting

an easement to the public to cross his beachfront land. The articulated government interest was that the lateral expansion of the home would reduce the amount of beach and ocean the public on the road side of the home could see. The Court indicated that preserving public views from the road really did not have an essential nexus with allowing folks to cross a beach. The Court also cited *Dolan v. Tigard*,[13] where the plaintiff wanted to expand her store and the community wanted the store to give the community some adjacent floodplain property and an easement for bike path in return for the possible increase in traffic. In *Dolan*, the Court basically indicated that there was really no relationship between the government interest and the exaction attempted.

willing to give enormous deference to local decisions about what is best for a community, thus offering support to the concepts and principles of the National Flood Insurance Program and NAI floodplain management.

State Court Decisions

The state courts have also supported well-reasoned approaches toward hazard-based regulation. *Gove v. Zoning Board of Appeals of Chatham* concerned a 1.8-acre parcel of undeveloped land located in a "coastal conservancy district" in Chatham, Massachusetts.[15] The parcel is susceptible to coastal flooding. The landowner sold the property to prospective purchasers on the condition that a building permit for a single-family home would be issued—a building variance was required under the town's zoning laws. The town declined to issue the permit, and the landowner and purchasers sued, alleging a taking. The court rejected their claim. In a ruling that

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The *Lingle* Court stated that these tests "all aim to identify regulatory actions that are functionally equivalent to a direct appropriation of or ouster from private property . . . ." This clear statement by the nation's highest court tremendously supports the National Flood Insurance Program and NAI approaches toward floodplain and stormwater management. Both approaches require the safe and proper development of land subject to a hazard while shunning government regulations that oust people from their property.

Kelo v. New London[14]

In *Kelo,* which involved the condemnation—or "paid taking"—of residences, the Court was asked to decide whether economic development in a community is considered a "public use" for purposes of a taking as described in the U.S. Constitution. The five-to-four decision that, yes, economic development can be considered a public use shows how much deference the majority of the Justices are willing to give to local decisionmakers who, in this case, had decided to condemn private land so that commercial redevelopment could take place. Pro-government and planning associations cheered the decision. However, the decision was also greeted with widespread public concern and outrage as well as several legislative proposals to curtail such development. *Kelo* and its aftermath illustrate the extreme sensitivity of property rights issues. But for floodplain and stormwater managers, the primary lesson is that the Court was

closely follows the concepts of NAI floodplain management, the court held that the plaintiffs failed to sufficiently demonstrate that they could construct a home on the property without potentially causing harm to both the building occupants and others. The lot was located not just in an area vulnerable to 100-year floods, but in one that lies immediately outside an area that would be exposed to high velocity ocean waves during such a flood event. Further, the area is subject to accelerated "normal" erosion and storm-related erosion. The decision in *Gove* validates and supports the concept that regulation to prevent harm, along the lines of NAI floodplain and stormwater management and hazards-based regulation in general, is not an unconstitutional taking of property. While the decision is binding only on Massachusetts courts, it should have persuasive effect in other jurisdictions.

In *Palazzolo v. State*,[16] an important takings case remanded in 2001 by the U.S. Supreme Court with instructions for rehearing, the Rhode Island courts sided with the state and against the landowner. The decision is extremely well-written and well-reasoned, and represents a huge win for floodplain and hazard managers. Essentially, a Rhode Island trial court determined that the stringent hazard prevention restrictions in coastal construction implemented by the Rhode Island Coastal Resources Council did not take private property in violation of the Fifth Amendment. The case is well worth reading since it offers a great review of takings law, the *Penn Central* balancing test, the public trust doctrine, and nuisance law.

Using NAI to Avoid Disputes

Resistance from landowners and developers is sometimes understandable and even inevitable. Government officials should therefore adhere to the following NAI principles to withstand judicial scrutiny in a takings lawsuit:

- Do not interfere with owners' rights to exclude others.[17]
- Do not deny the landowner of all economic use.[18]
- In highly regulated areas, consider the use of transferable development rights or similar residual rights so the land has appropriate value.[19]
- Clearly relate regulation to preventing a hazard.[20]
- Provide some flexibility in the regulation and apply the principle to the local government's own activities.
- Refer to the American Planning Association's 1995 *Policy Guide on Takings*.[21]

Even where land use regulation does not amount to a taking, state and local governments may find their decisions subject to attack. But by ensuring that affected portions of the community are notified and that they can express their concern to elected officials, NAI helps regulators avoid bluster and other empty threats. Further, by engaging in collegial problem solving under the NAI approach, confrontations between a regulator and developer are reduced. Therefore, the possibility of "class of one" allegations, in which the regulator is accused of engaging in discriminatory treatment based on personal animus or other inappropriate factors, are curtailed. And because takings actions are rarely available to developers where the regulator has used the NAI approach, developers may resort to claims that he or she has been deprived of a constitutional right "under the color of law."[22] But as with takings cases, courts are deferential to government efforts to prevent harm. Moreover, NAI gives states and municipalities the legal information to stand up to frivolous lawsuits.

Conclusion

Wetland, stormwater, and floodplain managers can be heartened by the recent court decisions that support the government's management of areas prone to flooding. The U.S. Supreme Court has delineated four taking tests, all of which tend to restrict takings to fairly narrow circumstances. The Court has also indicated that deference will be given to local decisions in matters of land use and community development. This is particularly helpful to wetland, stormwater, and floodplain management because it underscores the responsibility for and prerogatives of localities for management of land within their jurisdictions. In addition, courts from two influential states have supported local zoning, regulatory, and other management techniques intended to protect development from hazards, prevent development from having adverse impacts on other property, and preserve environmentally sensitive areas.

In the end, state and local regulators should remember that hazard-based floodplain and wetland regulations are generally sustained against constitutional challenges and the goal of protecting the public is afforded enormous deference by the courts. By using the NAI approach, state and local wetland and water quality officials should feel confident in adopting regulations that protect the public and the landowner. ■

—For a detailed paper on this issue, see No Adverse Impact Floodplain Management and the Courts*, by Jon Kusler & Ed Thomas, at http://www.floods.org. Also be sure to view* A Toolkit on Common Sense Floodplain Management *by the Association of State Floodplain Managers, also at http://www.floods.org.*

ENDNOTES

[1] 126 S. Ct. 2208 (2006).

[2] Edward A. Thomas, Rapanos v. United States: A Call for Partnership. *National Wetlands Newsletter* 28(5): 8.

[3] A Maxim of Law is, by definition, universally accepted and not subject to dispute, essentially like an Axiom of geometry.

[4] Testimony of Roger Pilon, Senior Fellow and Director, Center for Constitutional Studies, Cato Institute, Before the Subcommittee on Constitution, Committee on Judiciary, U.S. House of Representatives, Feb. 10, 1995.

[5] 260 U.S. 293 (1922).

[6] 125 S. Ct. 2074 (2005).

[7] 447 U.S. 255 (1980).

[8] 458 U.S. 419 (1982).

[9] 505 U.S. 1003 (1992).

[10] This raised questions to the courts: (a) how could developing the lots be a nuisance if there were only two undeveloped lots in a whole section of beach; and (b) what was the state plan to abate any nuisance resulting from existing homes?

[11] 438 U.S. 104 (1978).

[12] 483 U.S. 825 (1987).

[13] 512 U.S. 374 (1994).

[14] 126 S. Ct. 326 (2005).

[15] 444 Mass. 754 (2005).

[16] No. 88-0297 (R.I. Super. Ct. 2005). Available at http://www.olemiss.edu/orgs/SGLC/casealert.htm.

[17] *See, e.g.*, Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).

[18] *See, e.g.*, Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992).

[19] *See* Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978).

[20] See the very favorable court rulings in *Gove v. Zoning Board of Appeals of Chatham, Mass.*, 444 Mass. 754 (2005), and *Smith v. Town of Mendon*, 822 N.E. 2d.1214 (2004); in contrast to the unfortunate cases of *Annicelli v. Town of South Kingston*, 463 A.2d 133 (1983), and *Lopes v. Peabody* 417 Mass. 299 (1994).

[21] Available at http://www.planning.org/policyguides/takings.html.

[22] *See* 42 U.S.C. §§1983, 1988. Section 1983, codifying the Civil Rights Act of 1871, provides that anyone who, under color of state or local law, causes a person to be deprived of rights guaranteed by the U.S. Constitution, or federal law, is liable to that person. Section 1988 sets forth the proceedings for vindicating those rights, including the payment of attorneys fees to a prevailing plaintiff.